No. 85-1513

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EDWIN W. EDWARDS, in his official capacity as Governor of Louisiana, *et al.*,

Appellants,

v.

DON AGUILLARD, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Fifth Circuit

BRIEF OF PEOPLE FOR THE AMERICAN WAY, AMERICAN SOCIETY OF BIOLOGICAL CHEMISTS, AMERICAN SOCIETY OF ZOOLOGISTS, FEDERATION OF AMERICAN SOCIETIES FOR EXPERIMENTAL BIOLOGY, NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS, NATIONAL CENTER FOR SCIENCE EDUCATION, NATIONAL EDUCATION ASSOCIATION, NATIONAL SCHOOL BOARDS ASSOCIATION, WALTER BOCK, PRESTON CLOUD, ROBERT F. DRINAN, LANGDON GILKEY, STEPHEN JAY GOULD, THOMAS H. JUKES, COLLINS KILBURN, LEROY LEE, WILLIAM V. MAYER, ERNST MAYR, JOHN A. MOORE, NORMAN D. NEWELL, JOSEPH D. NOVAK, DAVID RAMAGE, JR., GEORGE M. RICKER, GERALD SKOOG AND JERRY R. TOMPKINS AS AMICI CURIAE IN SUPPORT OF APPELLEES

TIMOTHY B. DYK
Counsel of Record
A. DOUGLAS MELAMED
KERRY W. KIRCHER
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE

Amici curiae are eight scientific, educational and constitutional liberties groups,[1] and 17 individual scientists,

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[1] People for the American Way is a 250,000-member constitutional liberties organization.

The American Society of Biological Chemists ("ASBC") is a scientific and educational organization with a current membership of more than 7,000 professional biochemists. Most of ASBC's members are employed as college and university faculty. ASBC publishes the Journal of Biological Chemistry, a major peer-reviewed journal in the life sciences.

The American Society of Zoologists is a professional organization whose purpose is to present, discuss and publicly disseminate new or important facts and concepts in the area of animal biology.

The Federation of American Societies for Experimental Biology is an organization whose purpose is to develop and disseminate new knowledge in the life sciences through its meetings and publications. Many of the approximately 28,000 members of the federated societies work in major research, educational and clinical centers across the United States.

The National Association of Secondary School Principals ("NASSP") is a professional organization representing more than 35,000 middle school and senior high school administrators. NASSP members are responsible for the education of the nation's youth in a major portion of the country's 100,000 schools, attended by 44 million students.

The National Center for Science Education ("NCSE") is an organization whose purpose is to promote and advance the teaching of science in the public schools, and to educate and inform the public about issues concerning science education. The Committees of Correspondence is a project of NCSE dedicated to opposing the introduction of creationism into the public school science curriculum.

The National Education Association ("NEA") is a nationwide employee organization with a current membership of 1.8 million. The vast majority of NEA's members are employed as teachers and administrators in public educational institutions.

The National School Boards Association is an educational organization representing virtually all of the nation's school boards and

and educational and religious leaders,[2] interested in maintaining the high quality of public education and in preserving religious freedom. While *amici* believe that fostering debate and discussion in the public schools con-

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school systems. Its members—more than 95 percent of whom are elected public officials—are responsible for the education of more than 95 percent of the nation's public school students.

[2] Walter Bock is Professor of Evolutionary Biology at Columbia University.

Preston Cloud is Professor Emeritus of Biogeology at the University of California at Santa Barbara.

Robert F. Drinan, S.J., is Professor of Law at Georgetown University Law Center.

Langdon Gilkey is the Shailer Mathews Professor of Theology at the Divinity School, the University of Chicago.

Stephen Jay Gould is Professor of Geology at the Museum of Comparative Zoology at Harvard University.

Thomas H. Jukes is Professor of Biophysics and Medical Physics at the University of California at Berkeley.

Collins Kilburn is the Executive Director of the North Carolina Council of Churches.

LeRoy Lee is President of the National Science Teachers Association and Executive Director of the Wisconsin Academy of Sciences, Arts and Letters.

William V. Mayer is Professor Emeritus of Biology at the University of Colorado and President Emeritus of the Biological Sciences Curriculum Study.

Ernst Mayr is Professor Emeritus of Zoology at the Museum of Comparative Zoology at Harvard University and a 1969 recipient of the National Medal of Science.

John A. Moore is Professor Emeritus of Biology at the University of California at Riverside.

Norman D. Newell is Curator Emeritus at the American Museum of Natural History in New York City.

Joseph D. Novak is Professor of Biological Sciences and Chairperson and Professor, Science and Mathematics Education at Cornell University.

[Continued]

cerning the tenets of evolution is a permissible (indeed desirable) objective, *amici* believe that "creation-science" is a religious doctrine that has no place in public schools. They are concerned that balanced treatment requirements —such as the Louisiana statute at issue here that requires "balanced treatment" of evolution and "creation-science"—will degrade education in the public schools by requiring the teaching of a religious doctrine or by eliminating the teaching of an important secular subject. *Amici* therefore join appellees in urging this Court to affirm the judgment of the Court of Appeals finding the Louisiana statute unconstitutional.

Both appellants and appellees have consented to the filing of all *amicus* briefs. Letters of consent are on file with the Clerk of the Court.

SUMMARY OF THE ARGUMENT

Louisiana's "Balanced Treatment for Creation-Science and Evolution-Science Act" ("Balanced Treatment Act" or "Act"), La. Rev. Stat. Ann. §§ 17:286.1 *et seq.* (West 1982), permits evolution to be taught in the state's public elementary and secondary schools only if "creation-sci-

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[2] [Continued]

David Ramage, Jr. is President of McCormick Theological Seminary in Chicago.

George M. Ricker is Minister of Practical Theology and Ethical Concerns at the Campus Christian Community in San Marcos, Texas.

Gerald Skoog is Chairperson and Professor of Educational Leadership and Secondary Education at Texas Tech University and Retiring President of the National Science Teachers Association, 1986-87.

Jerry R. Tompkins is a Presbyterian Minister in Austin, Texas and author of D-Days At Dayton: Reflections on the Scopes Trial (1965).

ence" is also taught. The Act violates the Establishment Clause of the First Amendment as measured against the three-part test articulated by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

First, the purpose of the Act is to advance religion. On its face, it seeks either to require the teaching of a doctrine—"creation-science"—that is commonly understood to be religious, or to eliminate the teaching of evolution which is opposed by certain religious groups because of its perceived antagonism to their beliefs. The historical context in which the Act was enacted, its language and structure, and its legislative history lead inevitably to this conclusion.

Second, the Act has the primary effect of advancing religion. It directly aids in disseminating one belief of a particular religious group by teaching it in the public schools (or alternatively, it inhibits the teaching of a particular secular subject viewed by that religious group as antagonistic to its beliefs). The Act also symbolically benefits those religious groups by conferring on their beliefs the "imprimatur of state approval."

Finally, implementation of the Act will inevitably entangle the state with religion. The Act will require constant supervision, in the form of oversight of teachers and review of textbooks, to ensure that religious doctrine is not being taught, and it involves in the curriculum development process persons who hold certain religious views solely because they hold those particular views.

ARGUMENT

I. INTRODUCTION

Louisiana's Balanced Treatment Act requires the state's public secondary and elementary schools to give "balanced treatment" to "creation-science" and "evolution-science." [3] La. Rev. Stat. Ann. § 17:286.4(A). The Act does not require either (or indeed any) theory of origins to be taught, but it does require that whenever evolution is taught, "creation-science" must also be taught. *Id.* at § 17:286.5. This requirement applies to classroom lectures, textbook materials, library materials and other educational programs. *Id.* at § 17:286.4(A). Both evolution and "creation-science" are required to "be taught as a theory, rather than as proven scientific fact." *Id.*

The Act also requires that each local school board develop and provide to each public school teacher a curriculum guide on the presentation of "creation-science," *id.* at § 17:286.7(A), and it requires the governor to designate a panel of seven "creation-scientists" to assist local school boards in developing the curriculum guides. *Id.* at § 17:286.7(B).

Finally, the Act prohibits discrimination against any teacher "who chooses to be a creation-scientist or to teach scientific data which points to creationism." *Id.* at § 17:286.4(C). It does not provide a similar protection for teachers who choose to teach evolution.

Evolution has been described as "the greatest unifying theory in biology," E. Mayr, Populations, Species and Evolution 1 (1970), and the vast majority of the world's

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[3] "Balanced treatment" is defined as the "information and instruction in both creation and evolution models the classroom teacher determines is necessary and appropriate to provide insight into both theories." *Id.* at § 17:286.3(1). "Creation-science" is tautologically defined as "the scientific evidences for creation and inferences from those scientific evidences," and "evolution-science" is similarly defined. *Id.* at § 17:286.3(2), (3). The Act does not define "creation" or "evolution."

scientists believe that it best explains the facts relating to the origin and development of life forms. The Balanced Treatment Act does not require that public school teachers simply explain that some religious groups reject this important scientific theory, or simply identify "creation-science" (or creationism) as the alternative belief of those religious groups. Rather, it singles out evolution, among all the secular matters in the public school curriculum, and requires either that (1) the substance of one alternative—creationism—be taught (whenever evolution is taught) as if it were a science, or (2) that evolution not be taught at all.

The narrow, but important, question thus presented here is whether a state may require that evolution not be taught in the public schools unless creationism is also taught. *Amici* believe that such a requirement is inconsistent with the Establishment Clause of the First Amendment, regardless of whether its ultimate aim and effect is to eliminate evolution from the public school curriculum or to promote the teaching of creationism.

The case also raises the more fundamental and far-reaching issue of whether, as a general matter, a state may require that the teaching of secular subjects be "balanced" by the teaching of selected religious doctrine. If Louisiana prevails here, there is no principled reason why any majority, or any effective combination of minorities, could not require that the teaching of any secular subject in the public schools be "balanced" by its particular religious views.

II. THE ANTI-EVOLUTION ANTECEDENTS OF THE LOUISIANA BALANCED TREATMENT ACT HAVE BEEN HELD UNCONSTITUTIONAL BY THIS COURT AND BY LOWER FEDERAL AND STATE COURTS

The Balanced Treatment Act is the latest in a long series of efforts by certain creationist religious groups to foster the teaching of the Biblical account of creation in the public schools and to eliminate the teaching of mod-

ern scientific theories of evolution. These efforts have been part of a broader move—which this Court has consistently and repeatedly rejected (whatever the asserted justification)—to teach religious doctrine and conduct religious exercises in public schools.[4]

The anti-evolution crusade began in earnest in the 1920's, more than 60 years after Charles Darwin published On the Origin of Species by Means of Natural Selection (1859), his seminal work on the theory of evolution.[5] With William Jennings Bryan as their most prominent leader, creationists succeeded in enacting anti-evolution laws in four states between 1923-28.[6] In the celebrated Scopes Monkey Trial, the Tennessee anti-evolution statute was held not to violate the Constitution.[7]

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[4] *See, e.g., Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948) (use of public school facilities for religious classes unconstitutional); *Engel v. Vitale*, 370 U.S. 421 (1962) (recitation of specific "non-denominational" prayer in public schools unconstitutional); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) (recitation of verses from Bible in public schools unconstitutional, despite opportunity for students to be excused); *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam) (posting of Ten Commandments in public schools unconstitutional); *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985) (minute of silence for meditation or voluntary prayer unconstitutional).

[5] *See* E. Larson, Trial and Error: The American Legal Controversy Over Creation and Evolution 28-48 (1985).

[6] The states were Oklahoma (1923), Tennessee (1925), Mississippi (1926) and Arkansas (1928). *See* Larson, *supra* note 5, at 48-57, 75-81. Anti-evolution measures were introduced, but not enacted, in 16 other state legislatures between 1921-29. *See* American Civil Liberties Union, The Gag On Teaching 8 (3d ed. 1940). In addition, the Florida legislature adopted a concurrent resolution in 1923 declaring the teaching of evolution to be " 'improper and subversive to the best interests of the people,' " Larson, *supra* note 5, at 53, and state and local educational boards in California, North Carolina, Texas and Louisiana administratively restricted the teaching of evolution during the 1920's. *See id.* at 75.

[7] This Court was prevented from reviewing the constitutionality of the Tennessee statute when the Tennessee Supreme Court re-

The anti-evolution forces were publicly ridiculed as a result of the Scopes trial, and over the next thirty years no new anti-evolution legislation was enacted. Nevertheless, during that same period, efforts to repeal existing anti-evolution laws failed, restrictions against the teaching of evolution were imposed by local school boards, and textbook publishers de-emphasized evolution because of existing restrictions and fears of further controversy.[8] Not until 1968 did this Court declare prohibitions on the teaching of evolution to be unconstitutional. In *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968), the Court held that such a prohibition violates the Establishment Clause because of its religious purpose and effect: "to suppress the teaching of a theory which, it was thought, 'denied' the divine creation of man."[9]

Following *Epperson*, creationists adopted new tactics. They first challenged, unsuccessfully, the teaching of evolution as inhibiting their constitutional free exercise rights.[10] They also challenged certain forms of governmental support for evolution instruction as inhibiting the free exercise of creationist religions and as establishing a religion of "secular humanism." Again they were unsuccessful.[11]

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versed Scopes's conviction for a technical error in sentencing. *See Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927).

[8] *See* Larson, *supra* note 5, at 81-90.

[9] The Mississippi Supreme Court declared its anti-evolution statute invalid on the basis of *Epperson* in *Smith v. State*, 242 So. 2d 692 (Miss. 1970). Tennessee had repealed its statute in 1967, and Oklahoma had repealed its law much earlier, in 1926.

[10] *See Wright v. Houston Independent School District*, 366 F. Supp. 1208 (S.D. Tex. 1972), *aff'd*, 486 F.2d 137 (5th Cir. 1973) (per curiam), *cert. denied*, 417 U.S. 969 (1974); *see also Mozert v. Hawkins County Public Schools*, No. CIV-2-83-401 (E.D. Tenn. filed Dec. 2, 1983) (asserting claim that teaching of evolution and other secular subjects violates free exercise rights).

[11] *See Willoughby v. Stever*, No. 1574-72 (D.D.C. 1972) (National Science Foundation funding of textbooks discussing evolution held

Creationists also pressed state school authorities to discourage the teaching of evolution and permit the teaching of creationism. In California, for example, the state Board of Education was pressed into adopting a policy in 1970 giving equal recognition to creationism and evolution.[12] The Board, however, repealed this policy in 1972 and replaced it with one requiring simply that " 'dogmatism be changed to conditional statements where speculation is offered as explanation for origins.' " [13] This policy was later approved in a lawsuit brought by creationists challenging the allegedly dogmatic presentation of evolution in California's public schools.[14]

In Texas, the state Board of Education was pressed into adopting a policy in 1974 that required textbooks to identify evolution as one of several explanations of the origins of man and explain that any material presented on evolution was theory rather than verified fact.[15] In 1984, after the state Attorney General opined that the policy was unconstitutional,[16] the Board changed the policy to require only that all " '[t]heories shall be clearly distinguished from fact and presented in an objective educational manner.' " [17]

In Indiana, the state Textbook Commission approved a creationist text in 1975 for use by the state's public schools. When two local school boards adopted only the

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constitutional), *aff'd mem.*, 504 F.2d 271 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 927 (1975); *Crowley v. Smithsonian Institution*, 636 F.2d 738 (D.C. Cir. 1980) (exhibition at Smithsonian on evolution held constitutional).

[12] *See* Larson, *supra* note 5, at 122-23, 140.

[13] *Id.* at 140.

[14] *See id.* at 142-43 (discussing *Segraves v. California*, No. 278978 (Cal. Super. Ct. 1981)).

[15] *See id.* at 139-40.

[16] Tex. Att'y Gen. Op. No. JM-134 (1984).

[17] Larson, *supra* note 5, at 162-63.

creationist text, the state Commission's approval of that text was challenged and struck down as an establishment of religion.[18]

Most recently, creationists have promoted the notion that the Biblical account of creation is supported by scientific evidence, and they have urged various state legislatures to compel the teaching of that account in public schools. A Tennessee statute that required that evolution be identified as theory in public school textbooks, and mandated "equal space" for other theories "including, but not limited to, the Genesis account in the Bible," was declared "patently unconstitutional" by the Sixth Circuit.[19]

Arkansas's "balanced treatment" statute, which closely resembled the Louisiana Act, was recently ruled unconstitutional by a federal district court:

> [The Arkansas statute] was simply and purely an effort to introduce the Biblical version of creation into the public school curricula. The only inference which can be drawn from these circumstances is that the Act was passed with the specific purpose by the General Assembly of advancing religion. The Act therefore [violates the Establishment Clause].

McLean v. Arkansas Board of Education, 529 F. Supp. 1255, 1264 (E.D. Ark. 1982).[20] Like its cousin in Arkansas, the Louisiana Act also violates the Establishment Clause of the First Amendment.

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[18] *See Hendren v. Campbell*, No. S577-0139 (Ind. Super. Ct. 1977).

[19] *Daniel v. Waters*, 515 F.2d 485, 492 (6th Cir. 1975); *see also Steele v. Waters*, 527 S.W.2d 72 (Tenn. 1975) (per curiam).

[20] Measures similar to the Arkansas statute were introduced in eight state legislatures in 1980 and fourteen in 1981. Only Arkansas and Louisiana enacted balanced treatment laws. *See* Larson, *supra* note 5, at 151. Earlier, in 1976, Kentucky adopted a statute that gives public school teachers the option of presenting creationism along with evolution. Students who receive such instruction can receive academic credit for correctly learning the Biblical account. Ky. Rev. Stat. § 158.177 (1980).

III. THE LOUISIANA BALANCED TREATMENT ACT VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

The First Amendment provides that "Congress shall make no law respecting an establishment of religion." [21] Over the years, this Court has developed a well-defined, three-part test to resolve Establishment Clause questions. To pass constitutional muster, (i) a "statute must have a secular legislative purpose," rather than a religious purpose, (ii) "its principal or primary effect must be one that neither advances nor inhibits religion," and (iii) it "must not foster 'an excessive government entanglement with religion.'" *Lemon*, 403 U.S. at 612-13 (*quoting Walz v. Tax Commission*, 397 U.S. 664, 674 (1970)). This three-pronged test is the legal standard against which the Balanced Treatment Act must be judged. As this Court noted recently, "We have particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children." *Grand Rapids School District v. Ball*, 105 S. Ct. 3216, 3222 (1985).[22]

A statute is invalid under the Establishment Clause if it fails to meet even one part of the *Lemon* test. As

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[21] The Establishment Clause is applicable to the states through the Fourteenth Amendment. *Everson v. Board of Education*, 330 U.S. 1 (1947).

[22] Appellants' suggestion that the "alternative historical test" employed in *Marsh v. Chambers*, 463 U.S. 783 (1983), should be applied in this case, *see* Brief of Appellants at 29-32, is untenable. As appellants themselves recognize, *Marsh*, in essence, carves out an exception from the Establishment Clause for practices—such as the opening of legislative sessions with a prayer offered by a chaplain paid with public funds—that were accepted as constitutional at the time the First Amendment was adopted. Balanced treatment of creationism and evolution is not such a practice.

we now show, the Balanced Treatment Act runs afoul of all three parts.[23]

A. The Purpose of the Balanced Treatment Act Is To Advance Religion

The objective of the Balanced Treatment Act is self-evident: it seeks either to promote the teaching of creationism in the public schools, or to eliminate the teaching of evolution. Either way, its purpose is to advance religion.

As a matter of common understanding, creationism is a religious concept.[24] It involves the belief that life, mat-

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[23] Justice O'Connor has articulated a refined version of the *Lemon* test under which the Balanced Treatment Act also fails to pass constitutional muster. *See infra* notes 36 and 41.

Justice Brennan has articulated still another test to measure compliance with the Establishment Clause which invalidates involvements of religious with secular institutions that, *inter alia*, "(a) serve the essentially religious activities of religious institutions; [or] (b) employ the organs of government for essentially religious purposes. . . ." *Schempp*, 374 U.S. at 231 (Brennan, J., concurring). The Balanced Treatment Act also runs afoul of the Brennan test since Louisiana is using its public schools to do the work of religious institutions, *viz.*, teach religious doctrine.

[24] In a 1981 survey conducted by the Louisiana Department of Education, more than 74 percent of Louisiana's school superintendents said they understood "creation-science" to be a religious doctrine: 39.5 percent identified it as the Biblical account of creation, and another 34.9 percent identified it as "the argument that the universe was made by a creator." Joint Appendix E—798-99 ("J.A.").

Creationism is patently religious, notwithstanding appellants' insistence that it has a nonreligious meaning: " 'origin through abrupt appearance in complex form of biological life, life itself, and the physical universe.' " Brief of Appellants at 15 (*quoting* from affidavit submitted in support of appellants' opposition to motion for summary judgment). This "definition" appears nowhere in the Act or its legislative history. Indeed, those who promote "creation-science" understand it to include the following tenets: (i) that a divine Creator created life and the universe from nothing; (ii) that the Creator fashioned distinct "kinds" of plants and animals that cannot give rise to new "kinds"; (iii) that a worldwide flood formed

ter and the universe were created from nothing by some Supreme Being. These are undeniably religious tenets. *See, e.g., Torcaso v. Watkins*, 367 U.S. 488, 489 (1961); *Davis v. Beason*, 133 U.S. 333, 342 (1890). Creationism is derived from the Genesis account of creation in the Bible, and this Court has previously observed that "the place of the Bible as an instrument of religion cannot be gainsaid." *Schempp*, 374 U.S. at 224. A law that seeks to introduce religious dogma into the public school classroom indisputably has a religious purpose. *See, e.g., Stone v. Graham.*[25]

Louisiana has attempted to avoid this result by calling creationism "science." But, as this Court has repeatedly held, labels such as "science" or "morality" do not transform religion into nonreligion. *See, e.g., Stone v. Graham; School District of Abington Township v. Schempp; Engel v. Vitale.*

By the same token, evolution is a venerable scientific doctrine. While there is controversy as to which theories of evolution best explain the origins and development of man and other complex forms of life, there is near universal agreement among scientists that complex forms

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fossils and other geological phenomena; and (iv) that life and the universe were created relatively recently. *See Amicus Curiae* Brief of 71 Nobel Laureates, *et al.* at 7, 20-21. The parallels between these tenets and the Biblical account of creation are obvious, and they "convey an inescapable religiosity." *McLean*, 529 F. Supp. at 1265.

[25] *See also Malnak v. Yogi*, 592 F.2d 197, 215 (3d Cir. 1979) (Adams, J., concurring) ("Once SCI/TM is found to be a religion, the establishment resulting from direct government support of that religion through the propagation of its religious ideas in the public school system is clear.").

Appellants implicitly concede that the Act's purpose is religious when they argue that the Act ensures a neutral balance between religion and nonreligion which "exclusive instruction in evolution thwarts." Brief of Appellants at 45. In other words, appellants concede that evolution is a nonreligious subject and that "creation-science" is a religious doctrine that Louisiana seeks to "balance" against it.

of life did evolve from simpler forms over a period of millions of years.[26] It is also a matter of common knowledge that that view is perceived by certain fundamentalist religious groups as irreconcilable with their belief in the Genesis account of creation, and bitterly resisted for that reason. *Epperson*, of course, teaches that a law that prohibits a "theory which is deemed antagonistic to a particular [religious] dogma," 393 U.S. at 107, has a religious purpose every bit as much as a law that prefers a particular religious doctrine.

The religious purpose of the Balanced Treatment Act is also apparent from other factors that the Court should consider—the historical context in which the law was enacted, the language and structure of the statute, and its particular legislative history.[27] *See McLean*, 529 F. Supp. 1263.

1. *The Historical Context In Which the Balanced Treatment Act Was Enacted Demonstrates That Creationism Is a Religious Concept and That Evolution Is Opposed by Some Religious Groups Because It Is Viewed as Antagonistic to Their Beliefs*

The historical context in which the concept of "creation-science" and the idea of balanced treatment legislation developed has already been described. It is clear from a review of that background that promotion of creationism and attacks on evolution go hand in hand, and that

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[26] *See generally* National Academy of Sciences, Science and Creationism (1984). It is significant that the five affidavits submitted by appellants in opposition to appellees' motion in the district court for summary judgment offer no positive support for any alternative theory of origins. Rather, they purport only to establish that particular theories of evolution are unproven. *See* Appendix B to Brief of Appellants.

[27] In determining the "purpose" of a statute challenged under the Establishment Clause, courts are not bound by legislative statements of purpose, legislative disclaimers, or explanations advanced during litigation by the statute's proponents. *See Stone*, 449 U.S. at 41-42; *Schempp*, 374 U.S. at 223-24.

both are products of deeply felt religious belief. *See especially Epperson*, 393 U.S. at 98, 107-09; *Crowley*, 636 F.2d at 741-43; *McLean*, 529 F. Supp. at 1258-62; *Wright*, 366 F. Supp. at 1209-11.

Moreover, it is significant that the organizations that have attempted to give content to "creation-science," actively promoted its introduction into the public school curriculum, and orchestrated attacks on the teaching of evolution, are clearly fundamentalist religious organizations.[28] Applicants for membership in the Creation Research Society, for example, must sign a statement of belief:

> that the Bible is the written word of God and that its assertions are historically and scientifically true; that all basic types of living things, including man, were made by direct creative acts of God as described in Genesis; and that the Noachian Deluge was a historical event.[29]

The faculty at the Institute for Creation Research, the research division of the Christian Heritage College, must swear that they agree with the following doctrinal position:

> 'We believe in the absolute integrity of Holy Scripture and its plenary verbal inspiration by the Holy Spirit as originally written by men prepared for God for this purpose. The scriptures, both Old and New Testament, are inerrant in relation to any subject with which they deal, and are to be accepted in their natural and intended sense . . . all things in the universe were created and made by God in the six days of special creation described in Genesis. The creationist account is accepted as factual, historical

[28] These groups include the Institute for Creation Research, the Creation Research Society, the Creation Science Research Center, the Bible Science Association, and the Genesis School of Graduate Studies. *See McLean*, 529 F. Supp at 1259-60; D. Nelkin, The Creation Controversy: Science or Scripture in the Schools 77-87 (1982); Scheid, *Evolution and Creationism in the Public Schools*, 9 J. Contemp. L. 81, 94 n.55 (1983).

[29] Nelkin, *supra* note 28, at 79.

> and perspicuous and is thus fundamental in the understanding of every fact and phenomenon in the created universe.' [30]

See also McLean, 529 F. Supp. at 1259-61.

In sum, passage of the Balanced Treatment Act was not an isolated event. It was part of a process, reaching more than sixty years into the nation's past, that was and continues to be pervasively religious. As the Court of Appeals correctly noted:

> [T]his case comes to us against a *historical background* that cannot be denied or ignored. . . .
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> . . . .
>
> . . . Our decision is not made in a vacuum, nor do we write on a clean slate. We must recognize that the theory of creation is a religious belief. We cannot divorce ourselves from the historical fact that *the controversy between the proponents of evolution and creationism has religious overtones.*

Aguillard v. Edwards, 765 F.2d 1251, 1253, 1256 (5th Cir. 1985) (emphasis added).

2. *The Language and Structure of the Balanced Treatment Act Demonstrate That its Purpose Is To Advance Religion*

The Balanced Treatment Act is a unique incursion by the Louisiana legislature into the public school classroom. The Act is not part of any general legislative program of curriculum oversight or designation.[31] It singles out crea-

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[30] *Id.* at 81 (*quoting* Christian Heritage College Catalog (1974)).

[31] The Louisiana legislature has addressed a small number of other curricular matters, but only in very different and limited ways. For example, it has enacted laws requiring that public schools offer certain courses of study—such as the Constitution, French language and culture, and civics—without in any way prescribing the content of those courses. La. Rev. Stat. Ann. §§ 17:261, :272 (West 1982), :274.1 (West 1982 & Supp. 1986). It has also established overall objectives for a limited number of courses. *See, e.g.*, La. Rev. Stat.

tionism, alone among all the alternative explanations of origins, labels it "science" and requires that it be taught whenever evolution is taught. By so doing, the Act accords to creationism a favored status. This special status is enhanced by the Act's prohibition of discrimination against those who teach creationism and its failure to afford the same protection to those who teach evolution, La. Rev. Stat. Ann. § 17:286.4(C), and by its explicit inclusion of "creation-scienists" in the curriculum development process. *Id.* at § 17:286.7.

Moreover, the Act singles out evolution, alone among all topics of modern science, and requires that it be labeled "theory." *Id.* at § 17:286.4(A). There is no reason for this special treatment other than to diminish the status of evolution in furtherance of the convictions of those who find it contrary to their religious beliefs. *See Amicus Curiae* Brief of 71 Nobel Laureates, *et al.* at 22-26.

By thus singling out creationism for favored treatment and evolution for disfavored treatment, the Act reflects a legislative purpose to further one particular religious doctrine.

3. *The Legislative History of the Balanced Treatment Act Demonstrates That its Purpose Is To Advance Religion*

The legislative history of the Balanced Treatment Act further confirms that the Louisiana legislature understood "creation-science" to be a religious doctrine and intended, through the Act, to advance a particular religious belief. Senator Bill Keith, the Act's main sponsor, introduced Senate Bill No. 956 in June, 1980. That bill effectively required balanced treatment of evolution and creationism.

Ann. §§ 17:270(A) (West 1982) (driver education), :274 (West 1982 & Supp. 1986) (free enterprise system). It is not true, as appellants suggest, that "Louisiana has a balanced treatment law for economics." Brief of Appellants at 3 n.10.

Creationism was described there as the "theory of creation ex nihilo" and defined as:

> the belief that the origin of the elements, the galaxy, the solar system, of life, of all the species of plants and animals, the origin of man, and the origin of all things and their processes and relationships were created ex nihilo and fixed by God.[32]

J.A. E—1a-1b.

Those who testified for the bill in hearings before the Senate Committee on Education confirmed that they understood creationism to be a religious concept. For example, the lead witness for the bill, Luther Sunderland, an expert on "scientific creationism," testified that:

> the universe could not have generated itself according to every known basic law in science that we know about today. Therefore, this model *postulates that everything was created by some intelligence or power external to the universe.* The original organisms that were created, whatever these *kinds* were, were functionally complete when created including man. Man was ready to go when he hit this earth, so was every other originally created organism. . . . Now we cannot precisely define the creative *kind* but perhaps there was some *mankind, dogkind, and horsekind,* etc. and from these we have gotten the many varieties.[33]

J.A. E—9-10 (emphasis added). Babs Minhennete, another supporter of the bill, testified that:

> I think if you teach children that they are evolved from apes, then they will start acting like apes. If we teach them possibly that they were created by an Almighty God, then they would believe that they

[32] "Ex nihilo" means "from or out of nothing." Webster's Third New International Dictionary 797 (1971).

[33] The reference to "kinds" recalls the book of Genesis: "They, and every beast after his kind, and all the cattle after their kind, and every creeping thing that creepeth upon the earth after his kind, and every fowl after his kind. . . ." Genesis 7:14.

> were a creature of God and start acting like one of God's children.

J.A. E—25.

On June 24, 1980, the Senate Committee on Education deferred action on the bill and authorized the committee to study "scientific creationism." Shortly thereafter, a well-known creationist named Paul Ellwanger sent a copy of his "Model Balanced Treatment Act" to Senator Keith.[34] *See* Letter from Ellwanger to Keith (Aug. 5, 1980), J.A. E—749-52. In a September 9, 1980 letter to Senator Keith, Ellwanger stated that:

> I view this whole battle as one between God and anti-God forces. . . . if evolution is permitted to continue with its monopoly in public education, then, in effect, it will continue to be made to appear that a Supreme Being is unnecessary. . . . So it behooves Satan to do all he can to thwart our efforts and confuse the issue at every turn.

J.A. E—763-64. In the same letter, he advised Senator Keith to keep religious supporters of the balanced treatment bill behind the scenes. J.A. E—764.

The Joint Subcommittee on Elementary and Secondary Education held hearings in November and December, 1980, pursuant to the study resolution. During those hearings, Senator Keith presented as his lead witness Edward Boudreaux, a member of the Creation Research Society. In his prepared statement, Boudreaux stated that:

> [E]volution can in no way be accepted as authentic science. *Creation*, on the other hand, *requires the direct involvement of a supernatural intelligence*, and thus cannot be directly tested by the scientific method. . . . *It takes faith to accept creation* as a viable explanation of origins. . . .

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[34] Ellwanger is described in *McLean* as an activist in the creationist movement, and as a person who believes that "evolution is the forerunner of many social ills, including Nazism, racism and abortion." 529 F. Supp. at 1261.

J.A. E—153-54 (emphasis added). The Pro-Family Forum, a conservative Christian political action group, testified in a similar vein:[35]

> The creation model postulates that all the basic systems of nature, including elements, stars, planets, life and the major kinds of organisms, including man, were created fully developed *by super-natural creative processes during a primeval period of special creation*, following which conservative (rather than creative) processes were established to govern the completed creation.

J.A. E—169 (emphasis added). And during those same hearings, Senator Keith stated that:

> [I]t is my understanding that there are only two basic concepts for the origins. One concept is that a creator however you define that creator was responsible for everything that is in this world. The other concept is that it just evolved.

J.A. E—280.

In April, 1981, Senator Keith introduced a modified version of Ellwanger's Model Act as Senate Bill No. 86. Bill No. 86 defined "creation-science" as:

> the scientific evidences for creation and inferences from those scientific evidences. Creation-science includes the scientific evidences and related inferences that indicate: (a) sudden creation of the universe, energy, and life from nothing; (b) the insufficiency of mutation and natural selection in bringing about development of all living kinds from a single organism; (c) changes only within fixed limits or originally created kinds of plants and animals; (d) separate ancestry for man and apes; (e) explanation of the earth's geology by catastrophism, including the occurrence of a worldwide flood; and, (f) a relatively recent inception of the earth and living kinds.

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[35] Promotion of the teaching of creationism, and opposition to the teaching of evolution in the public schools, is high on the agenda of the Pro-Family Forum. The organization asserted in a recent newsletter that "[e]volution is the basis of every anti-Christian teaching." Pro-Family Forum Alert 2 (June, 1986).

J.A. E—298-99. The coincidence of this definition and the Genesis account is manifest.

During hearings on the bill before the Senate Committee on Education, Senator Keith expressed an undisguised hostility to evolution: "[O]ur public school children are being molested by secular humanism. . . . [and] the cardinal principal [sic] or the cardinal doctrine of those teachings is evolution." J.A. E—312-13.

While subsequent Senate amendments deleted much of the specific language defining "creation-science," no one suggested that the meaning of "creation-science" had been changed and supporters of the amended bill continued to attach a religious meaning to "creation-science." For example, Edward Boudreaux, the Creation Research Society member, testified as Senator Keith's first "scientific" witness during hearings before the House Committee on Education:

> I can say without a doubt that there is evidence in all areas of physical science which support creation-science, which incidentally is simply to say that the objective information of science does indeed *point to conditions of a creator*. . . .

J.A. E—501-02 (emphasis added). Senator Keith commented during those hearings that, "My preference would be that neither [creationism nor evolution] be taught." J.A. E—621.

The legislative history is thus clear both that "creation-science" was understood to be a religious doctrine, and that the balanced treatment requirement was intended to ensure either that creationism be taught in Louisiana's public schools or that evolution not be taught because of its perceived antagonism to the beliefs of certain religious groups.[36]

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[36] Justice O'Connor's variant of the purpose prong of the *Lemon* test asks "whether the government *intends* a . . . statute to convey a message of endorsement or disapproval of religion." *Wallace*,

4. *The Asserted Purpose of the Balanced Treatment Act—"Academic Freedom"—Does Not Justify the Teaching of Religious Doctrine in Public Schools*

Louisiana claims that the Balanced Treatment Act was enacted, not for the purpose of advancing religion, but "for the purposes of protecting academic freedom." La. Rev. Stat. Ann. § 17:286.2. This assertion is untenable.[37]

First, academic freedom means, in general, the ability of a teacher to determine, within reasonable bounds, course content and methodology of teaching. H. Hudgins, Jr. & R. Vacca, Law and Education 206 (1985). *See also Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). It is apparent from remarks made during the debates on the Act that the vast majority of science teachers prefer—as a matter of free academic choice—to teach evolution and not "creation-science." [38] It is unreasonable to assert that a law that compels public school teachers to teach something they would otherwise choose not to teach, or eliminates a subject they would otherwise choose to teach, was intended to further academic freedom.

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105 S. Ct. at 2500 (O'Connor, J., concurring) (emphasis added). Because the Balanced Treatment Act clearly intends a message of endorsement, it also fails this test.

[37] Commentators agree that this avowed purpose is a sham. *See, e.g.*, Whitehair, *Teaching the Theories of Evolution and Scientific Creationism in the Public Schools: The First Amendment Religion Clauses and Permissible Relief*, 15 U. Mich. J.L. Ref. 421, 451-52 (1982).

[38] For example, Eleanor Thomas, President of the Louisiana Science Teachers Association, testified on behalf of the Association's membership that:

> The members of this organization are opposed to this legislation since they consider creationism to be outside the boundaries of bona fide science. Any scientific concept that's based on established fact can be included in our curriculum already, and no legislation allowing this is necessary. This group is opposed to any legislation allowing the teaching of a questionable concept, such as scientific creationism. This would simply tend to imply credibility to a questionable concept.

J.A. E—616-17.

Second, and more importantly, even if "academic freedom" meant what appellants contend it does (*i.e.*, the interest of students in receiving selected additional information, Brief of Appellants at 36), it would not alter the fact that what the Act seeks to promote is a religious doctrine. This Court has repeatedly held that assertions of a facially secular purpose, such as "the promotion of moral values," do not justify, under the Establishment Clause, laws that in substance promote the teaching of religious doctrine in public schools. *See, e.g., Stone v. Graham*; *School District of Abington Township v. Schempp*; *Engel v. Vitale.* If "academic freedom" justified the teaching of creationism, the same justification would permit any state to require the teaching of any religious doctrine in its public schools.

In short, it simply does not matter whether Louisiana would like to expose its public school children to one particular alternative theory of origins. That is not a valid secular purpose because the alternative chosen is a religious doctrine.

B. The Primary Effect of the Balanced Treatment Act Is To Advance Religion

Regardless of its purpose, the Balanced Treatment Act violates the Establishment Clause because it will inevitably have the primary effect of advancing religion. *See Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973) (statute unconstitutional because its effect was to advance religion, even though it had a "secular legislative purpose").

First, the Act has the effect of aiding in the dissemination of a religious doctrine, and it does this in the strongest possible way: by teaching it. While it is permissible for a state to require public schools, for example, to teach that certain religious groups believe in creationism as part of a course in comparative religion, *see, e.g., Schempp*, 374 U.S. at 225, it is not permissible for a state to require that the substance of a religious doc-

trine be taught as science in the public schools. "[T]he [Establishment] Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular faith." *Grand Rapids School District*, 105 S. Ct. at 3226.

Indeed, the Balanced Treatment Act advances a particular religious view, namely, that of certain fundamentalist Christian groups, and thus is especially inimical to the Establishment Clause.[39] As this Court explained in *Larson v. Valente*, 456 U.S. 228, 244 (1982), "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."

Second, the Act confers a symbolic benefit on religion in violation of the effects test:

> an important concern of the effects test is whether the symbolic union of church and state . . . is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices. The inquiry into this kind of effect must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years.

Grand Rapids School District, 105 S. Ct. at 3226 (footnote omitted); *see also Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-26 (1982).

Here, the symbolic benefit arises by virtue of Louisiana's conferral of the "imprimatur of state approval" on one particular religious group. *Widmar v. Vincent*, 454 U.S. 263, 274 (1981). Specifically, the Balanced Treatment Act symbolically benefits certain fundamentalist religious

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[39] *See* Wood, *"Scientific Creationism" and the Public Schools*, 24 J. Church & St. 231, 240 (1982) ("'[S]cientific creationism' has been narrowly defined by a sectarian variety of Christian fundamentalism which is acceptable to neither mainline Christianity nor to mainline Judaism, not to mention the numerous nontheistic religious traditions. . . .").

groups by mandating that one of their beliefs—creationism—be taught in public schools, and by explicitly providing that adherents of that belief be appointed by the governor to participate in the curriculum development process.[40] Even if "creation-science" included some non-religious elements, Louisiana's unique intrusion into the public school curriculum plainly would be perceived as an endorsement by the state of a particular religious movement.[41]

The Balanced Treatment Act, of course, may have the effect, not of introducing creationism into the public school curriculum, but of excluding the teaching of evolution. In other contexts, this Court has recognized that "reply" or "equal time" requirements are generally inhibitory. *See, e.g., Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1974). School boards faced with the balanced treatment requirement might well decide to avoid controversy and teach neither evolution nor "creation-science." This effect is made more likely by the fact that the Act fails to prohibit discrimination against those who teach evolution while prohibiting discrimination against those who teach creationism. La. Rev. Stat. Ann. § 17:286.4(C).

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[40] Most, if not all, "creation-scientists" espouse fundamentalist Christian beliefs. *See* Part III.A.1 *supra*.

[41] Justice O'Connor's articulation of the effects test "asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring); *see also Wallace*, 105 S. Ct. at 2501 (1985) (O'Connor, J., concurring) ("The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.").

The Balanced Treatment Act certainly does convey a message of government endorsement of religion because creationism is commonly and rightly perceived by most observers to be a religious doctrine.

Impeding the teaching of evolution because it is antagonistic to the religious beliefs of some is itself an impermissible religious effect. *Epperson* makes clear that a law which has the effect of "blot[ting] out a particular theory because of its supposed conflict with the Biblical account" violates the Establishment Clause. 393 U.S. at 109.

Appellants defend the Act by arguing that it simply rights an imbalance between religion and nonreligion. Brief of Appellants at 45. Appellants are wrong on the facts, for the law clearly favors creationism (religion) over evolution (nonreligion). But even if the Act did no more than ensure even-handed treatment, it would still be unconstitutional. The effects test does not permit a state to advance religion by requiring that religious doctrine be taught in the public schools simply because secular subjects would otherwise predominate in the curriculum. To the contrary, the Establishment Clause prohibits just such state sponsorship of religious doctrine in the public schools. *See, e.g., McCollum*, 333 U.S. at 209-12. Were the law otherwise, a state could justify the introduction of any religious doctrine into the public schools on the ground that it provided "balance" in the curriculum.

In short, the Balanced Treatment Act confers a symbolic, as well as tangible, benefit on religion, and "convey[s] a message that religion or a particular religious belief is favored or preferred." *Wallace*, 105 S. Ct. at 2497 (O'Connor, J., concurring). Its primary (indeed its sole) effect is thus to advance religion in violation of the Establishment Clause.[42]

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[42] *See* Whitehair, *supra* note 37, at 454 ("Because this 'scientific' model so closely parallels the biblical account, it imparts science's aura of empirical certainty to a specific religious story. This religious effect is its primary, indeed sole effect.").

C. The Balanced Treatment Act Fosters an Excessive Entanglement Between Government and Religion

In *Lemon*, this Court explained that "political division along religious lines" is "one of the principal evils" that the Establishment Clause was intended to prevent. 403 U.S. at 622. The entanglement test serves this purpose by requiring separate spheres of administration—church and state—free of excessive interference from and entanglements with each other. Thus, what the Court called the "classic warning" of the Constitution against excessive government entanglement with religion admonishes us to guard against laws that "entangle the state in details of administration." *Id.* at 615 (*quoting Walz*, 397 U.S. at 695 (Harlan, J., concurring)). The Balanced Treatment Act will inevitably result in excessive entanglement under this standard.

First, even assuming that "creation-science" could be taught without reference to religion (which *amici* believe it cannot), state and local school officials would be required constantly to monitor its presentation to prevent instruction in religious doctrine because "creation-science" is so closely identified with the Genesis account in the Bible.[43] This concern is especially serious because the balanced treatment required by the Act is comprehensive. It applies not only to textbooks and library materials, but also to classroom teaching and other educational programs. La. Rev. Stat. Ann. § 17:286.4(A).

The monitoring and surveillance the Act would require is thus far more extensive than the simple act of "distinguish[ing] between secular and religious books" that was at issue in *Board of Education v. Allen*, 392 U.S. 236, 245 (1968). As this Court noted in *Lemon*, "Unlike a book, a teacher cannot be inspected once so as to de-

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[43] The necessity for monitoring classrooms is demonstrated by the fact that more than 74 percent of Louisiana's public school superintendents understand "creation-science" to be a religious concept. *See supra* note 24.

termine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment." 403 U.S. at 619. Under these circumstances, "'[T]he very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state.'" *Karen B. v. Treen*, 653 F.2d 897, 902 (5th Cir. 1981), *aff'd mem.*, 455 U.S. 913 (1982) (*quoting Lemon*, 403 U.S. at 620-21); *see also Aguilar v. Felton*, 105 S. Ct. 3232, 3237-38 (1985); *Meek v. Pittenger*, 421 U.S. 349, 370 (1975).

In *McLean*, the court summarized the entanglement problems posed by a statute that closely resembled the Balaneed Treatment Act:

> The State Department of Education, through its textbook selection committee, school boards and school administrators will be required to constantly monitor materials to avoid using religious references. The school boards, administrators and teachers face an impossible task. How is the teacher to respond to questions about a creation suddenly and out of nothing? . . . The answer is obvious because the only source of this information is ultimately contained in the Book of Genesis.

529 F. Supp. at 1272. So, too, will Louisiana's Act foster excessive entanglement between the state and religious matters.

The Balanced Treatment Act runs afoul of the entanglement test for a second reason. It requires the governor to designate a panel of seven "creation-scientists" to assist local school boards in developing curriculum guides on the presentation of "creation-science," which are to be provided to all public school teachers. La. Rev. Stat. Ann. § 17:286.7. "Creation-scientists," as a group, are distinguished by their belief in the literal truth of the Bible and their adherence to other fundamentalist Christian doc-

trines. The Act thus has the effect of involving in the curriculum development process people who hold particular religious views solely because they hold those views.

This enmeshing of religion in the exercise of governmental functions is just as offensive to the Establishment Clause as the intrusion of the state into religious affairs. As this Court noted in *Larkin*:

> The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions. . . .
>
> . . . Ordinary human experience and a long line of cases teach that few entanglements could be more offensive to the spirit of the Constitution.

459 U.S. at 127.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

TIMOTHY B. DYK
Counsel of Record
A. DOUGLAS MELAMED
KERRY W. KIRCHER
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Counsel for Amici Curiae *

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*Simon Heller, a summer associate at Wilmer, Cutler & Pickering, assisted on the brief.